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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER,

–against–

PREDRAG STEVIC

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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International Human Rights
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PRELIMINARY STATEMENT

This brief is offered by the Lawyers Committee for International Human Rights as an amicus curiae in this matter. Since 1978, the Lawyers Committee has monitored proposed legislation and regulations in the refugee and asylum areas, has engaged in litigation in

significant cases in those areas, and has assisted in providing legal representation for numerous applicants for political asylum in the United States from countries all over the world. The Lawyers Committee is dedicated to ensuring that refugees and asylum seekers receive just and equitable consideration under domestic and international law. The parties have consented in writing to the submission of this brief.

SUMMARY OF ARGUMENT

Prior to the ratification in 1968 of the United Nations Protocol relating to the Status of Refugees there was no comprehensive asylum law in the United States. Rather, three different procedures were used to give refuge to aliens in the United States: withholding of deportation, conditional entry, and admission under the Attorney General's parole power.

In 1968 the United States acceded to the Protocol and bound itself to apply a uniform, non-ideological refugee eligibility standard. Under the standard, a refugee must establish that he or she was persecuted or has a "well-founded fear of persecution" in his or her home country. Contrary to petitioner's suggestion, this standard

differs substanstantially from the previous standard for withholding of deportation under the Immigration and Nationality Act of 1952, which was interpreted to require an alien to show a "clear probability of persecution." In particular, the new standard emphasizes the character and state of mind of the individual.

The new standard, however, was not applied in practice by the agency. Consequently, contrary to petitioner's characterization, Congress became concerned about the failure to implement the Protocol standard and enacted the Refugee Act of 1980, incorporating and emphasizing the uniform, non-ideological standard.

The agency, however, has continued to adhere to the obsolescent "clear probability" standard in violation

of the Refugee Act.

The Court, moreover, owes no deference to the agency's "misinterpretation" since it is in violation of the Refugee Act.

Finally, this matter is moot in view of the fact that the agency has recently indicated that it is applying the new standard.

ARGUMENT

Point I

Because INS and the Courts failed to implement the United Nations Protocol relating to the Status of Refugees, Congress enacted clarifying legislation in the Refugee Act of 1980.

A. Prior to the ratification of the Protocol in 1968 there was no comprehensive asylum law in the United States.

"The United States traditionally has had one of the most generous and compassionate refugee programs of any nation."[1/] Nonetheless, the history of asylum and refugee law in this country prior to 1968 is essentially a saga of reaction to crises as they arose[2/] and of

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1/ Brief for Petitioner, Immigration and Naturalization Service, at 7.

2/ See e.g., The Displaced Persons Act, Pub. L. No. 80-774, 62 Stat. 1009 (1948). This legislation was enacted to confront the ongoing

(footnote continued)

ideological and geographical bias.[3] Before 1968, there were three procedures, each with a different standard, under which aliens could seek refuge in the United States.

1) Withholding of deportation

Under the Immigration and Nationality Act of 1952[4] the Attorney General was authorized to "withhold deportation of any alien ... to any country in which in his opinion the alien would be subject to physical persecution

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(footnote continued)
tragedy of mass migration in the wake of World War II.

3/ See, e.g., The Displaced Persons Act, Amendments of 1950, Pub. L. No. 81-555, 64 Stat. 219 (1950); H. R. Rep. No. 581, 81st Cong., 1st Sess., 15 (1949) (acknowledging the use of the law to accept political dissidents from Communist countries).

4/ Pub. L. No. 414, 66 Stat. 163 (current version at 8 U.S.C. § 1101) [hereinafter 1952 Act].

...."[5/] Faced with this discretionary authority to decline to deport an alien from the United States, INS developed a limiting policy to restrict "the favorable exercise of discretion to cases 'of clear probability of persecution of the particular individual petitioner'...."

5/ 1952 Act, § 243(h), 66 Stat. at 214 (current version at 8 U.S.C. § 1253(h)). Prior to 1965, an alien had to establish that he or she would be subject to "physical persecution" to be eligible for withholding of deportation. Congress amended the withholding provision in 1965 replacing "physical persecution" with "persecution on account of race, religion or political opinion." Immigration and Nationality Act, 1965 Amendments. Pub. L. No. 89-236, § 11, 79 Stat. 911, 918. [hereinafter 1965 amendments] (current version at 8 U.S.C. § 1253(h)) This change was considered by Congress to be in harmony with the 1951 United Nations Convention Relating to the Status of Refugees, even though the United States had not formally acceeded to the Convention. See In re Tan, 12 I&N Dec. 564 (BIA 1967).

In re Joseph, 13 I&N Dec. 70, (BIA 1968) [citation omitted]; In re Tan, 12 I&N Dec. 564, 568 (BIA 1967); Lena v. INS, 379 F.2d 536, 538 (7th Cir. 1967).6/

"Clear probability", furthermore, is a stringent standard.7/ See, e.g., In re Tan, [voluminous documentation of abuse of ethnic Chinese in

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6/ Unless otherwise indicated, the administrative cases cited herein have been designated as "precedents" by the Board of Immigration Appeals of the Department of Justice. 8 C.F.R. § 3.1(g) (1983). The Board is a creature of regulation and a delegate of the Attorney General. 8 C.F.R. § 3.1(a) (1983).

7/ It is misleading to assert (INS Brief at 25), that the Second Circuit "'attributed a stringency to the phrase "clear probability" that is inconsistent with [its] own observations in Cheng Kai Fu v. INS,'" 386 F.2d 750 (2d Cir.), cert. denied, 390 U.S. 1003 (1967). Cheng concerned the rejection of a motion to reopen deportation proceedings, and in deciding that the alien had failed to show even "some evidence"

(footnote continued)

Indonesia, letters from relatives, and an attack on the family business ruled insufficient]; In re Kojoory, 12 I&N Dec. 215, 217 [Iranian president of anti-Shah student organization denied withholding despite findings of "no doubt" that alien was "prominently involved" in political activities in the United States, and that it was "likely" that he had been so identified by the government of Iran].8/

(footnote continued)
of potential persecution, the court did not hold that "some evidence" would satisfy the burden of showing a "clear probability" of persecution.

8/ See also Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980), modified, sub nom., Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982). In that case, the district court found evidence of systematic and extensive persecution throughout the Haitian cases reviewed, yet not one applicant had met the "clear probability" standard. For example, one woman's father had been killed by the Ton
(footnote continued)

The application of this limiting principle was reviewable only for abuse of discretion. Where "the Attorney General's course of conduct shows consistency in the various cases," his ungenerous interpretation of the law was deemed insufficient cause to hold that "he has exercised his discretion in an arbitrary manner." Lena v. INS, 379 F.2d at 538.

2) Conditional Entry Status

The second procedure, conditional entry,9/ was enacted in 1965 and concerned the admission of refugees from overseas The INS could grant this status to aliens:

(footnote continued)
Ton Macoutes, who had come for her just after she had fled. Another woman had been jailed after the murder of both her husband and her son. 503 F. Supp. at 474-510.

9/ 1965 Amendments, § 3, 79 Stat. 913 (repealed at 94 Stat. 107).

> who satisf[ied] an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution on account of race, religion, or political opinion they [had] fled (I) from any Communist or Communist-dominated country or area, or (II) from any country in the Middle East, and (ii) [were] unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) [were] not nationals of the countries or areas in which their application for conditional entry is made....

1965 Amendments, § 3, 79 Stat. 913 (repealed at 94 Stat. 107). There was a a numerical ceiling on admissions, and relief was strictly limited by ideology and geographic location.10/

Judicial review was ordinarily precluded, since most of the eligibility

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10/ See 8 C.F.R. § 235.9(a)(1983), which limited the countries in which conditional entry visas could be processed to Austria, Belgium, France, Germany, Greece, Hong Kong, Italy and Lebanon.

determinations were made abroad and few aliens from Communist or Middle-Eastern countries had been able to come to the United States.11/ While the precedents are sparse, it is apparent that the conditional entry standard was more lenient than the withholding standard. See Cheng Fu Sheng v. Barber, 269 F.2d 497, 499 (9th Cir. 1959) [construing the term "fear of persecution" in the unrelated Refugee Relief Act of 1953 as "in sharp contrast" to the stringent withholding of deportation provision]. See also In re Tan, 12 I&N Dec. at 569-70; In re Adamska, 12 I&N Dec. 201, 202 (BIA 1967) [holding conditional

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11/ The only reported cases prior to 1968 are In re Adamska, 12 I&N Dec. 201 (BIA 1967) [Polish visitor]; In re Lalian, 12 I&N Dec. 124 (BIA 1967) [Iranian visitor]; In re Frisch, 12 I&N Dec. 40 (BIA 1967) [Yugoslavian student].

entry to be "substantially broader" than the pre-1965 withholding.][12/]

3) Attorney General Parole Power

In 1952, the Attorney General was granted authority to "parole" aliens temporarily into the country "for emergent reasons or for reasons deemed strictly in the public interest." 1952 Act, § 212(d)(5), 66 Stat. at 188 (current version at 8 U.S.C. § 1182(d)(5)(A)). This third procedure was also used to admit refugees from overseas. In contrast to conditional entry, there were no numerical limitations. In contrast to withholding, there were no ideological or geographic limitations. In practice, however, as the following table shows, the parole power was

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12/ See In re Ugricic, 14 I&N Dec. 384, 385-86 (BIA 1972), in which conditional entry was found to require but "good reason to fear persecution."

used almost exclusively to admit those fleeing communism.

PRE-1968 USE OF PAROLE POWER[13/]

Non-Communist	Total Authorized
Europe (1956)	925
Communist	
Hungary (1957)	32,000
Cuba (1960-67)	185,487
Chinese-Hong Kong (1962)	15,000
USSR (1963)	224
	232,711

B. The United States acceded in 1968 to the United Nations Protocol relating to the Status of Refugees and bound itself to apply a uniform, non-ideological refugee eligibility standard.

13/ Compiled from P.W. Schmidt, Fall 1979 INS Reporter, 1-3; World Refugee Crisis: The International Community's Response, Report to the Committee on the Judiciary, 96th Cong., 1st Sess., 213 (1979).

In 1968 the United States became a party to the 1967 United Nations Protocol relating to the Status of Refugees (hereinafter Protocol).[14] The United States thereby bound itself to apply the provisions of the Protocol,[15] which defines the term "refugee" as a person who

> owing to well-founded fear of being persecuted for reasons of race,

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14/ The Protocol relating to the Status of Refugees was opened for signature on January 31, 1967. 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N. T.S. 267. It was ratified by the United States on October 4, 1968. 114 Cong. Rec. 29,607 (1968).

15/ S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 1 (1968); Letter of Submittal, Message from the President of the United States transmitting the Protocol relating to the Status of Refugees, S. Exec. K., 90th Cong., 2d Sess., v (1968); see In re Dunar, 14 I&N Dec. 310, 313, (BIA 1973).

> religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

Protocol, Art. I § 2.[16/]

The sponsors of the Protocol, and expert witnesses who appeared before the Senate Foreign Relations Committee, were unequivocal in their assurances that ratification of the document "would not

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16/ As the brief of amicus American Immigration Lawyers Association demonstrates (point D (2)(d)), aside from the United States, there are numerous other signatory nations which adhere to the Protocol standard.

impinge adversely upon the Federal and State laws of this country."17/

In particular, Eleanor McDowell of the Office of the Legal Advisor of the Department of State testified before the Foreign Relations Committee on the subject of the Protocol, and stated that "existing regulations which have to do with deportation would permit the Attorney General sufficient flexibility to enforce the provisions of this convention which are not presently contained in the Immigration and Nationality Act." S. Exec. Rep. No.

17/ 114 Cong. Rec. 29,391 (1968) [Statement of Sen. Mansfield]; accord, 114 Cong. Rec. 27,757 (1968) [Message from the President transmitting the Protocol]; id. at 27,758 [Letter of submittal from the Department of State]; 114 Cong. Rec. 27,844 (1968) [Statement of Laurence A. Dawson of the Department of State].

14, 90th Cong., 2d Sess., 8 (1968).

C. The inquiry under the "well-founded fear" standard differs substantially from that under the "clear probability" standard.

In contrast to the "clear probability" standard, the "well-founded fear" standard introduces to the inquiry the character and state of mind of the individual applicant. See Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Geneva 1979) (hereinafter Handbook) at 11-13, ¶¶ 37-41, 45.[18/] Fear must be reasonable under the

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18/ The Second Circuit referred below to the United Nations High Commissioners' Handbook as a distillation of the "High Commissioner's 25 years of experience, the practices of governments acceding to the Protocol and literature on the subject." Stevic

(footnote continued)

circumstances. However, even "[e]xaggerated fear ... may be well-founded" if the applicant's interpretation of the situation, given his background, is reasonable. Handbook at 12, ¶ 41.

Generally a claimant's fear will also have external indicia. Under the Protocol standard, circumstantial evidence is relevant and admissible, and is to be evaluated in terms of "the personal and family background of the applicant, his membership of a particular

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(footnote continued)

v. Sava, 678 F.2d 401, 406 (2d Cir. 1982). The Board of Immigration Appeals has itself treated the Handbook as a significant source of guidance as to the meaning of the Protocol. In re Frentescu, Int. Dec. No. 2906 at 4 (BIA June 23, 1982); In re Rodriquez-Palma, 17 I&N Dec. 465 (BIA 1980). The pertinent provisions of the Handbook appear in an appendix submitted herewith.

racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences ...." Handbook at 12, ¶ 41 [emphasis supplied].

Thus, under the "well-founded fear" standard, "[d]etermination of refugee status will. . .primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin." Handbook at 11, ¶ 37. The conditions in the country in question may be relevant as external confirming evidence of the applicant's fear.19/

19/ The substantive refugee standard should be distinguished from the burden of proof and its allocation, which is on the individual applicant (8 C.F.R. § 208.5 (1983)) presumably by a preponderance of the evidence.

D. The Protocol standard was not applied in practice.

1) Withholding of deportation

The withholding of deportation provision, as amended in 1965,[20/] reads:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of his race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

The considerable flexibility permitted under the withholding provision could have accommodated the new refugee standard. However, while the Board of

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20/ See note 5 supra. 1965 Amendments to Act, § 3, 79 Stat. 918, amending § 243(h) of 1952 Act, 66 Stat. at 214 (current version at 8 U.S.C. § 1253(h)).

Immigration Appeals limited negative exercises of discretion[21/], it retained the "clear probability" standard. In re Joseph, 13 I&N Dec. at 72.

Furthermore, there was no consensus among the courts that reviewed withholding of deportation determinations after accession to the Protocol about the appropriate refugee eligibility standard.

21/ The Board explained In re Dunar, 14 I&N Dec. at 322, that "[w]hile the section 243(h) cases also speak in terms of the Attorney General's discretion, we know of none in which a finding has been made that the alien has established the clear probability that he will be persecuted and in which section 243(h) withholding has nevertheless been denied in the exercise of administrative discretion." But see In re Liao, 11 I&N Dec. 113, 117-19 (BIA 1965) [held no abuse of administrative discretion to deny withholding of deportation despite immigration judges reference to "considerable evidence" to support respondent's claim of likelihood of persecution upon return to Formosa].

Some used the "well-founded fear" standard. Pereira-Diaz v. INS, 551 F.2d 1149, 1154 (9th Cir. 1977); Zamora v. INS, 534 F.2d 1055, 1058 (2d Cir. 1976); Paul v. INS, 521 F.2d 194, 200 (5th Cir. 1975). Others used the "clear probability" standard. Martineau v. INS, 556 F. 306, 307 (5th Cir. 1977); Pierre v. United States, 547 F.2d 1281, 1289 (5th Cir. 1977), vacated and remanded to consider mootness, 434 U.S. 962 (1977); Cisternas-Estay v. INS, 531 F.2d 155, 159 (3d Cir. 1976); Rosa v. INS, 440 F.2d 100, 102 (1st Cir. 1971).

Still others used different standards. Khalil v. District Director, 457 F.2d 1276, 1277 n.3 (9th Cir. 1972) ["would be persecuted"]; Henry v. INS, 552 F.2d 130, 131 (5th Cir. 1977) ["probable persecution"]; Daniel v. INS, 528

F.2d 1278, 1279 (5th Cir. 1976); Shkukani v. INS, 435 F.2d 1378, 1380 (8th Cir.), cert. denied, 403 U.S. 920 (1971); Kovac v. INS, 407 F.2d 102, 105 (9th Cir. 1969) ["probability of persecution"]; Gena v. INS, 424 F.2d 227, 232 (5th Cir. 1970) ["likely" persecution].

Occasionally, the courts addressed the issue squarely. The Seventh Circuit opined that "the 'well-founded fear' standard in the Protocol and the 'clear probability' standard which this court has engrafted onto section 243(h) will in practice converge." Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1977). The Fifth Circuit explained, however, that the Protocol standard, as viewed by the Board, "suggest[ed] at least a slight diminution

in the alien's burden of proof ...." Coriolan v. INS, 559 F.2d 993, 997 n. 8 (5th Cir. 1977).

2) The parole power

The Attorney General's parole power was also sufficiently flexible to accommodate the ideologically neutral Protocol standard. In practice, however, as the following table shows, ideology continued to animate decision-making.

USE OF PAROLE POWER, 1968-80 22/

Non-Communist	Total Authorized
Latin America (excl. Cuba) (1975-78)	4,400
Uganda (1972-73)	1,750
Lebanese (1978)	1,000
	7,150

22/ See note 13 supra.

Communist	
Cuba (1968-78)	232,666
USSR (1970-77)	17,200
USSR & E. Europe (1978-79)	61,924
Czechoslavakia (1970)	6,500
Indochina (1975-79)	290,075
	608,365

That 7,150 non-Communists were admitted under the parole power shows that the Attorney General could have admitted refugees regardless of ideology. The percentage of non-Communists actually admitted, however, remained small.23/

23/ In 1972, the Department of State recognized that accession to the Protocol required implementing procedures and adherence to the new refugee standard. At that time, regulations were issued permitting aliens to seek sanctuary in the United States and abroad. 37 Fed. Reg. 3447 (1972). See also 39 Fed. Reg. 41832 (1974) which established
(footnote continued)

E. Congress became concerned about the failure to implement the Protocol.

After 1968 it became increasingly apparent to legislators that the INS was still using practices and procedures that frustrated implementation of the Protocol and that were inconsistent with its generous underlying humanitarian philosophy. Consistent with the United States' leadership in showing compassion for the persecuted, Congress called for legislation to ensure implementation of the Protocol.

As soon as the Protocol was ratified, members of Congress realized that the definition of refugee would have

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(footnote continued)
a formal asylum procedure for the INS that also recognized the applicability of the Protocol.

to be broadened.[24] This need was highlighted by the so-called Kurdica Affair in 1970, in which a Soviet sailor who had jumped ship was returned to his vessel without an opportunity to seek asylum.[25]

Legislators introduced bills to require INS to conform its standards and practices to those of the Protocol, and the pressure for change was constant from 1973 until the passage of the 1980 Act.[26] Bills considered in 1976 by the

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24/ See, e.g., S.3202, introduced into the Senate, 115 Cong. Rec. S. 36,965-66 (1969).

25/ See Congressional Research Service of the Library of Congress, Review of United States Refugee Resettlement Programs and Policies, 96th Cong., 2d Sess., 16 (1980).

26/ In 1973 Senator Kennedy introduced S.2643, referred to the Committee on the Judiciary, 119 Cong. Rec. 35,734 (1973). The definition of the term

(footnote continued)

(footnote continued)
"refugee" was patterned closely on the Protocol definition. Id. at 35,735, 35,737.

That same year in the House, very extensive hearings were held on H.R. 981. See Western Hemisphere Immigration, Hearings before House Subcomm. No. 1 of the Comm. on on the Judiciary, 93d Cong., 1st Sess. (1973). Witnesses noted with evident gratification the usage of the Protocol terminology. Id. at 249-50, 258, 304, 306, 326; see also 119 Cong. Rec. H. 31,360 (1973) [Statement of rep. Eilberg introducing the bill on the House floor]; 119 Cong. Rec. 31,454-55 (1973).

In 1975, in introducing S.2405, Senator Kennedy said, "the act of 1965 was only the beginning of an important task .... It failed to resolve a number of issues relating to immigration .... It was generally recognized at the time that additional legislation would soon be needed. And this failure to act over the past decade has ... been detrimental to fulfilling the intent of the 1965 Act ...." 121 Cong. Rec. 29,947 (1975). The bill proposed to excise the 1965 ideological biases and to include the U.N. refugee definition.

House had contained the "well-founded fear" refugee standard.27/ Indeed, they were the subject of most of the hearings, and it is significant that representatives of the Departments of State and Justice recognized the difference between the stringent "clear probability" standard and the Protocol standard. The Justice Department, while supportive of

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27/ Most of the hearings concerned H.R. 367 and H.R. 981, both of which brought the definition of refugee in line with the Protocol. See Western Hemisphere Immigration, Hearings on H.R. 367, H.R. 981, and H.R. 10323, before the House Subcomm. on Immigration, Citizenship and International Law of the Comm. on the Judiciary, 94th Cong., 1st and 2d Sess. (1976) [hereinafter 1976 Hearings]. The eventual 1976 amendments changed little, however. They were essentially a compromise after sponsors of more comprehensive legislation failed to gain the required support.

> the basic tenets of this [refugee] provision ... believe[d] that the 'well-founded fear of persecution' should be limited to the 'well-founded fear of persecution in the opinion of the Attorney General.' The Department believe[d] that ... [otherwise] it would be entirely subjective with the alien claiming refugee status whether his fear of being persecuted was well-founded [or not].

Western Hemisphere Immigration, Hearings on H.R. 367, H.R. 91, and H.R. 10323, before the Subcomm. on Immigration, Citizenship and International Law of the Comm. on the Judiciary, U.S. House of Representatives, 94th Cong., 1st and 2d Sess. (1976) at 18 [hereinafter 1976 Hearings].

The refugee standard was raised specifically in hearings in 1977. Congresswoman Holtzman, ultimately the co-sponsor of the 1980 legislation, stated her concern with the INS' narrow reading of the law:

> MS. HOLTZMAN. ... I wonder if you have any concern that ... we ought to ... spell out -- but not in an overly detailed manner -- the kinds of procedures that should be used.
>
> The reason I raise this is because when Congress creates a statutory scheme and does not really specify how that scheme is to be implemented it can be thwarted by the executive branch. I am concerned because I think the definition of refugee in this bill is an excellent one and even though it states what person will be a refugee if he or she has a well-founded fear of persecution, we don't specify how that well-founded fear is to be ascertained ....

Hearings on H.R. 3056, Policy and Procedures for the Admission of Refugees into the United States, before the House Subcomm. on Immigration, Citizenship, and International Law of the Comm. on the Judiciary, 95th Cong., 1st Sess., 126-7 (1977) [emphasis supplied]. Congresswoman Holtzman, as a lawyer, appreciated that a stringent application can

eviscerate the most generous legislation.28/

In 1978, Congressman Eilberg, expressing Congress' growing impatience with the INS' failure to fulfill the spirit of the Protocol, stated:

> For years, we have received assurances ... from the Justice Department ... that criteria, guidelines, and regulations would be promulgated ... so we would not have to go through the necessity of moving legislation. Yet this has never taken place.

Hearings on the Admission of Refugees into the United States, II, before the Subcomm. on Immigration, Citizenship and International Law of the Comm. on the Judiciary, 95th Cong., 1st and 2d Sess., 15 (1978).

28/ H.R. 3056 is specifically cited in the legislative history of the 1980 Act as the genesis of that law. See H.R. Rep. No. 608, 96th Cong., 1st Sess., 7 (1979).

Thus, the stage was set for comprehensive legislation.

F. The Refugee Act of 1980 emphasized the uniform, non-ideological eligibility standard for refugee status.

The Refugee Act of 1980[29/] established a standard for uniform and non-ideological refugee eligibility. Congress intended this new standard to be compatible with the humanitarian traditions and international obligations of the United States. Central to the Act was a statutory definition of "refugee" which conformed to that of the Protocol. A refugee was defined as

> ... any person who is outside any country of such person's nationality or, in the case of

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29/ Pub. L. No. 96-212, 94 Stat. 102 (1980) [hereinafter the 1980 Act].

> a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion....

Section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A)(1982). This standard is used to determine claims for asylum under § 208(a) of the Act, 8 U.S.C. § 1158(a)(1982), and claims for withholding of deportation under § 243(h) of the Act, 8 U.S.C. § U.S.C. § 1253(h) (1982).30/

It is beyond dispute that Congress intended the definition of

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30/ See 8 C.F.R. § 208.3(b)(1983) Asylum requests "shall also be considered as requests for withholding exclusion or deportation pursuant to Section 243(h) of the Act"].

"refugee" in the 1980 Act to conform to that in the Protocol. See, e.g., 126 Cong. Rec. 3,757 (1980) [Statement of Senator Kennedy: "The new definition makes our law conform to the United Nations Convention and Protocol ...."]. During hearings, the derivation of the term was often mentioned and never questioned. This intent was emphasized in the report of the Senate Judiciary Committee and debate on the Senate floor. S. Rep. 256, 96th Cong., 1st Sess. (1979), 125 Cong. Rec. 23,231 (1979).

Similarly, throughout House consideration of the bill, references were made to "the fundamental change under the legislation ... the replacing of the existing definition of refugee with the definition which appears in the U.N.

Convention and Protocol ...." Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess., 27 (1979) [hereinafter 1979 House Hearings]; see also id. at 43, 168, 169, 248, 251, 280, 284, 291, 357, 361, 383, 393; 125 Cong. Rec. 35,813-26 (1979).

The purpose of changing the definition was not only to excise ideological bias from immigration law, but also to "facilitate bringing refugees into this country," since only a well-founded fear of persecution would have to be established. 1979 House Hearings, supra, at 169 and 284; Briefing on the Growing Refugee Problem, Hearing Before the Subcomm. on International Organizations of the Comm. on Foreign Affairs, 96th Cong.,

1st Sess., 4-5 (1979).

Congress emphasized its concern over the intransigence of INS in the past and expressed its intention to monitor compliance in the future: "The Committee intends to monitor closely the Attorney General's implementation of the [asylum] section so as to insure the rights of those it seeks to protect." H.R. Rep. No. 608, 96th Cong., 1st Sess., 18 (1979).

G. INS continued to follow the prior standard despite the enactment of the Refugee Act.

Even though Congress emphasized the uniform, non-ideological standard through the enactment of the Refugee Act of 1980, INS continued to follow the "clear probability" standard. See, e.g., In re McMullen, 17 I&N Dec. 542 (BIA 1980), rev'd, McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981). In McMullen, the

Board denied withholding despite confirming documentary evidence of the applicant's defection from the Provisional Irish Republican Army ("PIRA"), and the nature and activities of the PIRA, finding under the "clear probability" standard that the alien had not demonstrated that the Irish government could not control the PIRA. The Court of Appeals reversed, explaining that the standard applied had been virtually "impossible" to satisfy. 658 F.2d at 1319. See also Marroquin-Manriquez v. INS, 699 F.2d 129 (3d Cir. 1983), petition for cert filed, No. 82-1649 (April 7, 1983), [withholding denied by the Board where the applicant had been involved in a student political organization, a member of which had been killed, and the alien had been linked to the killing; and

where three expert witnesses testified in support of applicant's claim.31/

H. Adherence to the "clear probability" standard violates the Refugee Act

Courts have long recognized a "need for special judicial deference to congressional policy choices in the immigration context." Fiallo v. Bell, 430 U.S. 787, 793 (1977). This principle requires respect for legislative intent. "By contrast, the power of the INS is more circumscribed ... [and it] must conform its actions to the statutes ...."

31/ In connection with the petition for rehearing below, INS submitted several recent unpublished decisions of the Board which used the "clear probability" standard. In re Fernandez-Blanco, A23-225-100 (BIA Feb. 18, 1982); In re Balboa-Pena, A23-221-155 (BIA Feb. 11, 1982) In re Bernal-Torres, A23-225-865 (BIA Feb. 10, 1982); In re Mendez-Valdes, A23-217-202 (BIA Dec. 20, 1981).

Haitian Refugee Center v. Civiletti, 503 F. Supp. at 452.

The Court should reject administrative constructions that are inconsistent with the mandate of Congress or that frustrate the policy that Congress sought to implement. S.E.C. v. Sloan, 436 U.S. 103, 118 (1978); see also Morton v. Ruiz, 415 U.S. 199, 237 (1974). The Court should thus require the administrative authorities to "honor the clear meaning of a statute as revealed by its language, purpose and history." International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 556 n.20 (1979). Anything less would be an endorsement of INS' impermissible interference with Congress' legislative function under the Constitution. See INS v. Chadha, 51 U.S.L.W. 4907, 4919 (U.S. June 23, 1983)

(Powell, J., concurring).

A fair reading of the legislative history shows that the 1980 Refugee Act was designed to adopt the Protocol's "well-founded fear" standard. As the Second Circuit recognized below, the Act must be followed.

Point II

The Court, as the final authority on issues of statutory construction, is obliged to review independently the legal standard under Section 243(h), and need not defer to INS' interpretation.

In reviewing administrative action, a "court shall decide all relevant questions of law ...," 5 U.S.C. § 706 (1977), and must do so with a critical perspective independent of the agency's interpretation. Although the court may grant a presumption of validity to an agency's application of law where

the agency has statutory discretion or expertise peculiar to the area, the reviewing court is the ultimate authority in issues of statutory construction. See Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981). The agency's construction of a statute is "only one input in the interpretational equation." Zuber v. Allen, 396 U.S. 168, 192 (1969).

The analysis of the "well-founded fear" standard in the 1980 Act does not require deference to any specialized knowledge of INS. See Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 270 (1960). Rather, the legal standard to be applied requires reference to an international agreement. A knowledge of the rules of statutory construction, a sensitivity for foreign affairs

implications, and an attentiveness to the policies underlying the law are required. All of these are matters uniquely within the purview of the court. See Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983); Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 41 n. 27 reh'g denied, 430 U.S. 976 (1977).

Courts have traditionally looked to signs of congressional action or inaction for determining the weight to be accorded the agency's interpretation of a statute. See, e.g., CBS, Inc. v. FCC, 453 U.S. 367, 382-385 (1981); Saxbe v. Bustos, 419 U.S. 65, 74-79 (1974). If Congress has either not reconsidered the statutory language, or has reenacted the statute without modification, courts frequently assume that the legislature

acquiesces in the agency's interpretation. NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974).

In this case, Congress modified the agency's governing statute -- a modification showing that the agency's construction was wrong. The court is not obliged to stand aside and rubber stamp the administrative misinterpretation. See Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 745-6 (1973); NLRB v. Brown, 380 U.S. 278, 291 (1965).

The 1980 legislation provided a statutory foundation for "our national commitment to human rights and humanitarian concerns ...." S. Rep. No. 256,

96th Cong., 1st Sess., 1 (1979).[32] This generous purpose requires implementation of the "well-founded fear" standard.

Point III

This matter is moot.

In connection with the petition for rehearing below, INS submitted several recent unpublished decisions of the Board which tested the applicants' claims under the following formulation:

> [A]n alien must demonstrate a clear probability that he will be persecuted if returned to his country or a well-founded fear of such persecution [citations omitted] [emphasis supplied].

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[32] See also IV K.C. Davis, Administrative Law Treatise, § 30.09 at 241 (1958) ["[C]ourts, not the agencies, are comparatively the experts in ... most analysis of legislative history...."].

In re Amador-Aranda, A24-704-992, (BIA April 8, 1982); In re Rurale-Terry, A23-220-248 (BIA March 18, 1982); In re Araujo-Rodriguez, A23-217-764 (BIA March 12, 1982); In re Chao-Estrada, A24-793-918 (BIA March 9, 1982). If the agency has conformed its practice and now adheres to the standard under the Protocol and Refugee Act, then this claim has "lost its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract propositions of law." Hall v. Beals, 396 U.S. 45, 48 (1969); see, Powell v. McCormack, 395 U.S. 486, 496 (1969).

"[T]he burden of demonstrating mootness 'is a heavy one'." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) [citation omitted]. The adoption

in practice of the new refugee standard would satisfy the burden: Stevic will no longer have "a legally cognizable interest in the final determination of the underlying question of fact and law." Id. See also DeFunis v. Odegaard, 416 U.S. 312 (1974).33/

33/ Congress is also considering legistion that would render this case moot, the so-called Simpson-Mazzoli bill (S.529, H.R. 1510). The Senate version (S.529) passed the Senate on May 18, 1983. The House version (H.R. 1510) was reported out of the Judiciary Committee on May 13, 1983, and may be considered this year. Mr. Stevic would be presumptively eligible under the legalization provisions of either the Senate or the House versions of the legislation, and he would no longer be subject to deportation at that time. His claim would definitely have "lost its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract propositions of law." Hall v. Beals, 396 U.S. 45, 48 (1969). Under the legislation Stevic would become a permanent resident of the United States. He could hope for no more as a refugee.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,[34]

Lawyers Committee for
International Human Rights
by Arthur C. Helton

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[34] Counsel wishes to acknowledge the assistance of Deborah Gieringer, Anne Goldstein, Karen McCreary, and Clive Stafford Smith (law students) in the preparation of this brief.

APPENDIX

Handbook on Procedures and Criteria for Determining Refugee Status

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37. The phrase "well-founded fear of being persecuted" is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining refugees by categories (i.e. persons of a certain origin not enjoying the protection of their country) by the general concept of "fear" for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin.

38. To the element of fear -- a state of mind and a subjective condition -- is added the qualification "well-founded". This implies that it is not only the frame of mind of the person concerned that deter-mines his refugee status, but that this frame of mind must be supported by an ob-jective situation. The term "well-founded fear" therefore contains a sub-jective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.

39. It may be assumed that, unless he seeks adventure or just wishes to see the world, a person would not normally abandon his home and country without some compelling reason. There may be many reasons that are compelling and understandable, but only one motive has been singled out to denote a refugee. The expression "owing to well-founded fear of being persecuted" -- for the reasons stated -- by indicating a specific motive automatically makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated. Such other motives may not, however, be altogether irrelevant to the process of determining refugee status, since all the circumstances need to be taken into account for a proper understanding of the applicant's case.

40. An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape; another may carefully plan his departure.

41. Due to the importance that the definition attaches to the subjective

element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences -- in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified.

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45. Apart from the situations of the type referred to in the preceding paragraph, an applicant for refugee status must normally show good reason why he individually fears persecution. It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word "fear" refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.